IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 24, 2008

STATE OF TENNESSEE v. KELLYE M. HILTON

Appeal from the Criminal Court for Sullivan County
No. S50,197 R. Jerry Beck, Judge

No. E2007-01518-CCA-R3-CD - Filed September 4, 2008

The defendant, Kellye M. Hilton, pleaded guilty in the Sullivan County Circuit Court to one count of forgery, a Class E felony, *see* T.C.A. § 39-14-114, and one count of identity theft, a Class D felony, *see id.* § 39-14-150. Pursuant to a plea agreement between the parties, the trial court imposed an effective sentence of two years to be served as 150 days' incarceration followed by probation. In this appeal, the defendant contends that the trial court should have granted a sentence of full probation. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Joseph Harrison, Assistant District Public Defender, for the appellant, Kellye M. Hilton.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; and Julie R. Canter, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 23, 2006, the defendant entered pleas of guilty as established in *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), to one count of forgery and one count of identity theft in exchange for an effective sentence of two years, with the manner of service of the sentence to be determined by the trial court.[1] The State offered the following version of facts at the plea submission hearing:

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[1] In *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes his best interests would be served by a plea of guilty.

> [O]ur proof would be that on February 3rd, 2003, Ms. Judy Hilman, who is a Sullivan County Sessions Court clerk reported to officers at Kingsport Police Department that she had received a call from a Ms. Yvonne Monk[,] who is employed . . . at the Tennessee Eastman Company Payroll Department. Ms. Monk stated that she had received a fax from Ms. Hilman in reference to a civil case on an employee named Kellye Hilton, and it was referencing a pending garnishment on Ms. Hilton.
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> Ms. Hilman told Ms. Monk that she had not sent the fax to her in reference to the case. A copy of that letter was then sent to Ms. Hilman[,] who reviewed the letter, the fax, and determined that it was, indeed, a forgery of her signature.
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> On March 24th, 2003, the detective located the Defendant, Kellye Hilton. She came to the Justice Center to be interviewed, and Ms. Hilton stated at that time that she had forged the name of Ms. Hilman to the note to stop a pending garnishment of her wages from Tennessee Eastman Company because she panicked and did not want to lose her job over the garnishment.
>
> . . . .
>
> Apparently Ms. Hilton was afraid she would lose her job due to garnishment and was trying to set up a scenario where she would be allowed – the garnishment would be released so that she could make installment payments. But that indeed was not true at the time.

The plea agreement provided that the trial court was to determine the manner of service of the sentence, and a sentencing hearing was held for that purpose on June 18, 2007.[2] At the hearing, the 42-year-old defendant testified that she held an associate's degree in medical office assistance and "almost an associate['s] degree in business." At the time of the hearing, she was working part time in a Kingsport restaurant and anticipating her elderly father's release from the hospital. The defendant stated that she is solely responsible for her father's care. The defendant stated that, should the trial court grant probation, she would be able to work full time despite her duties with her father and would be able to make restitution payments. The defendant referred to the offenses as "the stupidest thing" she had ever done and stated, "I totally have been the one to suffer. I lost my job, my home, everything over what I did."

[2] On October 23, 2006, the defendant also entered an *Alford* plea to one count of theft over $10,000 in case number S50,613 in exchange for a sentence of three years' probation to be served consecutively to any sentence imposed in this case.

During cross-examination, the defendant admitted that after committing the offenses at issue in this case, she embezzled more than $10,000 from her employer, resulting in a conviction for theft of $10,000 or more. She also admitted that she had 12 convictions for uttering worthless checks and had not yet finished paying restitution in those cases.

At the conclusion of the hearing, the trial court ordered a period of "shock incarceration" of 150 days on the basis that "[a]bout the only thing that cures bad check writers and forgers and that type of thing is have them serve a little bit of time." The court also noted its concern that the defendant's offense involved "the use of the offices of the court." The court allowed the defendant 30 days before beginning the service of her sentence to "give her plenty of time to address her father's issue."

In this appeal, the defendant asserts that the trial court should have granted probation or other alternative sentencing. The State submits that the defendant was granted an alternative sentence and that she failed to demonstrate her suitability for full probation. We agree with the State.

When a defendant challenges the manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003).[3] This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id.* If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210(a), (b);-103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

Under the 2003 version of the Sentencing Act, an "especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for

[3] Because the offenses in this case occurred prior to the effective date of the 2005 amendments to the Sentencing Act and the defendant did not execute a waiver of her ex post facto protections, the defendant was sentenced pursuant to the 2003 version of the Act. *See* T.C.A. § 40-35-114 (Supp. 2005), compiler's notes; *see also State v. Robert Lamont Moss, Jr.*, No. M2006-00890-CCA-R3-CD, slip op. at 5 n.1 (Tenn. Crim. App., Nashville, Dec. 4, 2007).

alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2003).[4] Further, a defendant is eligible for probation "if the sentence actually imposed upon such defendant is eight (8) years or less," and the trial court is required to consider probation as a sentencing option. *Id.* § 40-35-303(a), (b). A defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The trial court's determinations of whether the defendant is entitled to an alternative sentence and whether the defendant is a suitable candidate for full probation are different inquiries with different burdens of proof. *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). When, as is the case here, the defendant is entitled to the statutory presumption favoring alternative sentencing, the State must overcome the presumption by the showing of "evidence to the contrary." *Ashby*, 823 S.W.2d at 169; *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled in part on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000); *see* T.C.A. §§ 40-35-102(6), -103. What constitutes "evidence to the contrary" can be found in Tennessee Code Annotated section 40-35-103, which provides:

> Sentences involving confinement should be based on the following considerations:
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> > (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> >
> > (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> >
> > (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. §40-35-103(1).

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[4] The 2005 amendment to Code section 40-35-102(6) provides that those defendants who meet certain statutory prerequisites "should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6) (2006).

Conversely, the defendant is required to establish her "suitability for full probation as distinguished from [her] favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

In this case, the trial court awarded the defendant an alternative sentence of split confinement, with 150 days' incarceration followed by probation. *See State v. Kenneth Jordan*, No. M2002-01010-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Nashville, May 8, 2003) ("A sentence of split confinement, as ordered here, qualifies as an alternative sentence."); *State v. Adam Short*, No. 03C01-9703-CR-00090, slip op. at 3 (Tenn. Crim. App., Knoxville, Jan. 28, 1998) (providing that the "benefit the defendant enjoyed in being presumed a suitable candidate for alternative sentencing had been depleted" by his receiving an alternative sentence of split confinement); *see also State v. Fields*, 40 S.W.3d 435 (Tenn. 2001) (observing that an alternative sentence is any sentence that does not involve total confinement). In addition, the defendant has failed to establish her suitability for full probation. The presentence report establishes that the defendant has two prior convictions for driving on a revoked license, 12 prior convictions for uttering worthless checks, and numerous traffic offenses. The report also indicates that the defendant uttered a worthless check on the day after being granted a suspended sentence in relation to a separate worthless check charge. Under these circumstances, the trial court did not err by denying a fully suspended sentence.

Accordingly, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE